Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OFFICER FOSTER BADGLEY, SGT. JOHN CANTALUPO,
OFFICER JAMES BIRCSAK, and
ACT. LT. RICHARD MANDRIOTA,

Petitioners,

v.

SONDRA CONNOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a court considering the appeal of a dismissal of a claim for false arrest brought pursuant to 42 U.S.C. § 1983 can ignore a finding at trial that probable cause for arrest existed and include — in the totality of the circumstances to be considered in evaluating objective reasonableness — alleged bias by the officers in favor of the victim, so as to defeat their claim of qualified immunity.

Whether a police officer defendant who has successfully moved to dismiss plaintiff's case at the end of plaintiff's evidence on the grounds that probable cause is established as a matter of law, without waiving his right under court rule to offer evidence in the event the motion is not granted, can be denied an opportunity to prove probable cause, and/or the objective reasonableness of his conduct, on remand after a reversal on appeal.

Whether all police officer defendants can be found liable for false arrest when there is no evidence of personal participation or action taken under color of state law by one of the defendants.

PARTIES TO THE PROCEEDING

Petitioners Foster Badgley, John Cantalupo and Richard Mandriota were, at all times relevant to this Petition, on-duty law enforcement officers employed by the Newark Police Department. Petitioner James Bircsak was an off-duty law enforcement officer employed by the Newark Police Department.

Respondent, Sondra Connor, is the plaintiff in a civil suit brought against respondents as a result of her arrest.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. The Altercation, Arrest and Charges	2
B. Proceedings Below	4
Reasons for Granting the Writ	6
I. The Decision Of The Supreme Court Of The State Of New Jersey Conflicts With Decisions Of The United States Supreme Court.	6
II. The Questions Presented Are Important	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) 6

Brower v. County of Inyo, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) 6

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) 7

Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) 6, 7

McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978) 9

Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) 6

West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) 8, 9

Statutes:

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... i, 1, 2, 4, 5, 8

N.J.S.A. 59:1-1 *et seq.* 4

Cited Authorities

Page

Rules:

New Jersey Court Rule 3:4-1 5

New Jersey Court Rule 3:4-1(b) 4

New Jersey Court Rule 4:37-2(b) 4

United States Constitution:

Fourth Amendment 1, 2, 6, 7

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of New Jersey Dated And Decided January 31, 2000 ..... 1a

Appendix B — Per Curiam Opinion Of The Superior Court Of New Jersey, Appellate Division Dated, Decided And Filed October 20, 1998 ..... 24a

Appendix C — Order Of Judgment Of The Superior Court Of New Jersey, Law Division, Essex County Dated And Filed October 3, 1997 ..... 35a

Appendix D — Relevant Rules 37a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of New Jersey in this case

OPINIONS BELOW

The Opinion of the Supreme Court of the State of New Jersey (App. A) is reported at 162 N.J. 397.

The Opinion of the Appellate Division of the Superior Court of the State of New Jersey (App. B) is unpublished.

The Order of the Superior Court of New Jersey — Law Division (App. C), granting Judgment in favor of defendants/ petitioners is not a written Opinion.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of the State of New Jersey was entered January 31, 2000. (App. A)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution and the provisions of 42 U.S.C. § 1983.

The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the united States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Altercation, Arrest and Charges

On May 14, 1994, an altercation occurred between Sondra Connor and Penelope Powell at a bingo hall in the City of Newark. James Bircsak, an off-duty member of the

Newark Police Department was present at the location of the altercation. Connor presented no evidence that Bircsak took any action with respect to the altercation or the subsequent arrest of the participants.

Defendant Badgley, an on-duty member of the Newark Police Department, was dispatched to the bingo hall in response to a telephone report of the incident. Badgley obtained versions of the incident from both parties. Connor claimed that Powell had attacked her with a chair and Powell claimed that Connor had attacked her with a fork. Powell admitted striking Connor with a chair when attacked by Connor with a fork. Both parties voluntarily proceeded to the police station to file complaints against each other. Badgley considered both under arrest at the bingo hall.

At the police station Badgley and Cantalupo, an on-duty member of the Newark Police Department assigned as acting desk lieutenant, reviewed the facts provided by the parties and applicable statutes and concluded that a charge of simple assault should be filed against Powell. Due to her alleged use of a fork, which Badgley and Cantalupo considered a dangerous weapon based on its potential for causing injury, they prepared criminal complaints which charged Connor with an indictable offense.

Powell later signed these criminal complaints and Mandriota, an on-duty member of the Newark Police Department who relieved Cantalupo as desk lieutenant, signed the jurat. The criminal complaints were later downgraded and Connor was found not guilty in a trial in the Municipal Court.

Connor filed suit against Badgley, Cantalupo, Bircsak and Mandriota and the City of Newark seeking damages for false arrest, false imprisonment, and malicious prosecution under both state law and 42 U.S.C. § 1983.

At trial Connor presented witnesses to support her version of the incident and evidence that the majority of forks at the bingo hall were plastic. Connor claimed that further investigation was required and that such investigation would have developed evidence to support her version of the incident. She also claimed that, under New Jersey Court Rule 3:4-1(b) a summons should have been used instead of an arrest warrant. Connor alleged that Powell received preferential treatment because she was related to members of the Newark Police Department.

Connor admitted that Powell had told Badgley that Connor had attacked her with a fork and presented no evidence to rebut the reasons provided by Badgley and Cantalupo as the basis for the charges filed.

B. Proceedings Below

At the conclusion of Connor's case defendants moved for dismissal, under N.J. Court Rule 4:37-2(b). (App. D) Under the procedure set forth in the rule, the motion is made without waiving the right to present evidence, should the motion be denied. The court dismissed all claims under state law based on provisions of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, which is not relevant to this Petition. The trial court then ruled that probable cause existed for the arrest on the criminal charges filed against Connor which constituted a defense to Connor's claims under 42 U.S.C. § 1983.

The Appellate Division affirmed the judgment, concluding that the police had probable cause to arrest Connor for aggravated assault, and agreeing that a plastic fork could constitute a dangerous weapon. The Appellate Division further held that, even if there had not been probable cause for the arrest, the facts known to the police were sufficient for an objectively reasonable belief that probable cause existed.

The Supreme Court of New Jersey granted certification and reversed the judgment. The court ignored the probable cause finding and, instead, held that in its consideration of the objective reasonableness of the officers' probable cause determination, the "totality of the circumstances" had to include failure to conduct additional investigation, and failure to issue a summons rather than a warrant pursuant to N.J. Court Rule 3:4-1, viewed in conjunction with allegations of preferential treatment of Powell.

The Court then concluded, contrary to the opinion of the Appellate Division, that no objectively reasonable officer could consider a plastic fork a dangerous weapon and that there was thus no objectively reasonable basis for probable cause for the arrest. The Court held all four of the officers responsible for the arrest and liable for damages under 42 U.S.C. § 1983 as a matter of law and remanded the case for a trial on damages only. This ruling denied petitioners the opportunity to present evidence to establish that their conduct was objectively reasonable and that they were entitled to qualified immunity.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SUPREME COURT OF THE STATE OF NEW JERSEY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

Several aspects of the Supreme Court of New Jersey's ruling are inconsistent with precedent of the United States Supreme Court.

To state a claim for unreasonable seizure under the Fourth Amendment a plaintiff must show that the seizure occurred and that it was unreasonable. *Brower v. County of Inyo*, 489 U.S. 593, 599, 109 S. Ct. 1378, 1382-83, 103 L. Ed. 2d 628 (1989).

Probable cause exists if at the time of the arrest the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the suspect committed the offense. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142, 145 (1964). Probable cause defeats a claim of false arrest and, if officers of reasonable competence could disagree on the existence of probable cause, the doctrine of qualified immunity should be applied. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986), *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). If an officer's belief that probable cause exists is objectively reasonable, he is entitled to immunity. Qualified immunity protects all officers but the plainly incompetent or those who

knowingly violate the law. *Malley*, *supra*, 475 U.S. at 341, 106 S. Ct. at 1092, 1096, 89 L. Ed. 2d at 271, 278 (1986).

The objective reasonableness of the officer's actions is to be assessed in light of the totality of the circumstances, without regard to underlying intent or motivation. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989). If a seizure was objectively reasonable, any bad faith motivating the officers would not matter for the purposes of the Fourth Amendment. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable seizure. *Graham*, *supra*, 490 U.S. at 396, 109 S. Ct. at 1872.

Officer Badgley, in reliance on the information provided by Connor and Powell, concluded that probable cause for arrest existed. He and Cantalupo reviewed the facts and applicable statutes and concluded that a fork used to attack another person could constitute a dangerous weapon for purposes of charging a criminal offense. These conclusions were confirmed by the trial court and the Appellate Division.

The New Jersey Supreme Court failed to follow the law set out by this Court in the cases cited *supra*. Instead, it incorrectly considered the impermissible factors of underlying intent and motivation in deciding the issues of both probable cause and the officers' objectively reasonable belief in its existence. In making these determinations, the issue is not failure to obtain evidence which further investigation might have developed or the arguable misapplication of a court rule when viewed with suspicion due to allegations of favoritism to a participant in the altercation. Nor should the question of whether probable

cause existed at the time of arrest, or whether the belief in its existence was objectively reasonable, turn on evidence developed later at the civil trial — evidence which the New Jersey Supreme Court found established that the fork used was plastic — or on inability to locate reported cases holding that a plastic fork is a dangerous weapon. Whether probable cause exists or, in the absence of probable cause, whether there is a basis for an objectively reasonable officer to conclude that probable cause exists, depends on the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, at the time of the arrest. In ruling otherwise, the New Jersey Supreme court departed from precedent set by this Court.

The New Jersey Supreme Court ruled that petitioners could not rely on the facts sworn to by Powell in the criminal complaint to establish their objectively reasonable belief in the existence of probable cause. This was so because Mandriota, whose only participation in the event was signing the criminal complaints above the jurat to be administered to the complainant, had not personally discussed the facts with Powell and because Powell might have signed the complaint outside of Mandriota's presence. The court so ruled despite Badgley's having received and relied upon the same information at the time of the arrest.

To state a claim under 42 U.S.C. § 1983 a plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2254-55, 101 L. Ed. 2d 40 (1988). To be liable pursuant to 42 U.S.C. § 1983, the defendant must have exercised power possessed by virtue of state law and made possible

only because the wrongdoer is clothed with the authority of state law. *West, supra*, 487 U.S. at 49, 108 S. Ct. at 2255.

In order to prevail against a specific defendant, a plaintiff must establish personal involvement by that defendant in the alleged constitutional deprivation. *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978).

There was no evidence that Bircsak exercised any power possessed by virtue of state law or had any personal involvement in the arrest of Connor or the filing of the criminal complaints. The New Jersey Supreme Court's holding that Bircsak was liable for false arrest as a matter of law is inconsistent with prior rulings of this Court.

II.

THE QUESTIONS PRESENTED ARE IMPORTANT

The New Jersey Supreme Court concluded that the existence of probable cause on the basis articulated by the petitioners, and accepted by both the trial court and Appellate Division as factually and legally correct, could be undermined by considerations of other factors, including the failure to further investigate and the arguable misapplication of a Court Rule in conjunction with allegations of bias against Connor due to favoritism toward Powell. This position is inconsistent with prior opinions of this Court and denies petitioners both the defense of the existence of probable cause and the defense of qualified immunity, based on the objective reasonableness of their conduct, to which they are entitled if there is an absence of probable cause. It will have the very

chilling effect on law enforcement officers which this Court sought to avoid by recognizing the objectively reasonable standard for immunity.

Reaching these conclusions as a matter of law in an appellate forum further denies the petitioners an opportunity to present any defense to the adverse conclusions first drawn against them on appeal.

This decision by the Supreme Court of the State of New Jersey will have a chilling effect on law enforcement officers, such as petitioners, by denying them the benefit of a defense based on either the existence of probable cause or the qualified immunity of objective reasonableness to which they are entitled under decisions of this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY DATED AND DECIDED JANUARY 31, 2000

Sondra CONNOR,

Plaintiff-Appellant,

v.

Penelope POWELL and John Doe, (fictitious name),

Defendants,

and

Newark Police Department, Officer Foster Badgley, Sgt. John Cantalupo, Officer James Bircsak and Act. Lt. Richard Mandriota,

Defendants-Respondents.

Supreme Court of New Jersey.

Argued Nov. 9, 1999.
Decided Jan. 31, 2000.

* * *

The opinion of the Court was delivered by

GARIBALDI, J.

Appendix A

This appeal concerns the trial court's involuntary dismissal of plaintiff, Sondra Connor's claims against four City of Newark police officers for false arrest, false accusation, false imprisonment, and malicious prosecution under *42 U.S.C.A. § 1983* ("*Section 1983*"). The central issue on appeal is whether there was probable cause, or alternatively, whether it was objectively reasonable for the police officers to believe that probable cause existed to arrest plaintiff and to issue a complaint-warrant charging her with aggravated assault and possession of a weapon for an unlawful purpose, and a separate complaint-summons for possession of a dangerous weapon.

I.

Connor is the executive director of the Foundation for Servicing Adults with Learning Disabilities of New Jersey. In that capacity, she supervises the operation of a bingo game conducted in a hall located in Newark. On Saturday, May 14, 1994, sometime around noon, Connor was preparing for the day's bingo activities when she observed Penelope Powell engaging in illegal gambling in the bingo hall. At that time, there were about fifty people in the bingo hall. Connor, who was approximately fifty feet from Powell, warned her to stop the illegal activity. The two women exchanged strong words in raised voices. According to plaintiff and several other witnesses, Powell responded by attacking Connor with a wooden chair, and hitting her several times on the head, shoulders, arms, and hands. Connor raised her arms above her head to protect herself. Powell's final blow struck a bingo volunteer. Connor testified that she had nothing in her hands at the time of the attack, and none of the witnesses who testified at trial saw any object in Connor's hands.

Appendix A

Connor sought the assistance of James Bircsak, an off-duty Newark police officer who witnessed the incident. According to plaintiff, Officer Bircsak was periodically employed by the Foundation to provide security. Officer Bircsak, however, denied ever working for the bingo hall.

Nevertheless, Officer Bircsak was present in the bingo hall when the incident occurred. According to plaintiff and bingo volunteer Marsha Ellison, Officer Bircsak was sitting in the snack bar area, approximately thirty-five feet away from where the incident took place. After being asked by Ellison to assist Connor, Officer Bircsak walked over and watched the altercation. Connor told Officer Bircsak: "You saw what happened. I want her arrested." According to Connor, Officer Bircsak responded that he could not arrest anyone because he was a "rookie" and "wasn't supposed to be there." A bingo volunteer then summoned the police.

Approximately fifteen minutes after the incident, Officer Foster Badgley of the Newark Police Department arrived at the scene. Officer Badgley and Officer Bircsak went outside to talk for a few minutes. When Officer Badgley returned inside, he asked plaintiff if she "was sure she wanted to make this complaint." Connor told Officer Badgley that Powell had assaulted her with a chair and that she wanted Powell arrested. Powell admitted to striking Connor several times with the chair, but claimed that plaintiff had threatened her with a fork and that she hit Connor in self-defense. Powell did not specify whether the fork was made of plastic or metal. However, the record reflects that the only forks in the bingo hall were plastic forks given to the public and two metal forks used to cook hotdogs in the snack bar area. Ellison

testified that she was in possession of the two metal forks that day.

Following the incident, neither Connor nor Powell exhibited any signs of injury. Officer Badgley asked Powell to point out the fork used by Connor in the attack, but she could not. Officer Badgley did not ask Powell to describe the fork. Officer Badgley stated that he did not look for the fork because he "wasn't going to start searching the premises for an item" when he "couldn't tell . . . whether that was the item or not." Officer Badgley also refused plaintiff's request to take a chair to the police station as evidence because Connor could not identify from the hundreds of wooden chairs in the bingo hall the specific chair Powell used to strike her. Officer Badgley did not speak to any of the approximately fifty people in the bingo hall about the incident. Likewise, none of the witnesses approached Officer Badgley to tell him what took place.

According to plaintiff, both women voluntarily accompanied Officer Badgley to the East District police station of the Newark Police Department. Plaintiff testified that she believed she was going to the police station to file a complaint. By contrast, Officer Badgley stated in his deposition that the women were arrested at the scene. Officer Badgley explained:

> I advised them that if they wished to make complaints against each other both would be arrested. If they did not wish to make complaints against each other, neither one would be arrested. They both stated they wanted the other one arrested. I arrested both of them.

Appendix A

When Connor arrived at the East District station, she saw Powell's daughter, a Newark police officer, in uniform. Connor and Powell repeated their conflicting factual allegations to the police. Powell signed a complaint against Connor alleging that Connor attacked her with a fork. Powell was charged with simple assault and was issued a summons. She was immediately released.

In what the Appellate Division correctly characterized as inartfully drafted complaints with erroneous statutory citations,[1] plaintiff was charged on a complaint and warrant with aggravated assault and possession of a dangerous weapon, a fork, for an unlawful purpose. The police issued a separate summons and complaint against plaintiff, charging her with possession of a dangerous weapon, a fork. Because all of the complaints filed against plaintiff contained erroneous statutory citations, to determine exactly what charges were intended is difficult.

It is undisputed, however, that unlike Powell, Connor was charged with serious indictable offenses, arrested, and placed in jail. Connor testified that when she arrived at the station, Officer Badgley first told her that she was under arrest. She

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1. In a warrant and complaint, Connor was charged with aggravated assault. However, the charging documents refer to N.J.S.A. 2C:12-1b(5), which pertains to assaults on police officers. In a second count, Connor was charged with possession of a weapon, a fork, for an unlawful purpose, but the complaint refers to N.J.S.A. 2C:39-5b, which describes possession of a handgun without a permit. In a separate summons and complaint, Connor was charged with possession of a dangerous weapon, a fork, citing N.J.S.A. 2C:39-4a, which describes possession of a firearm for an unlawful purpose.

was then handcuffed and chained to a chair. Connor was permitted to make one telephone call to her lawyer. Her attorney spoke with Sergeant John Cantalupo, the booking sergeant and acting desk lieutenant on duty at the time the charges were filed.

While at the East District Precinct, Connor demanded to be taken to a hospital and was transported to University Hospital at 4:00 p.m. According to Connor, Officer Bircsak visited her at the hospital and implored her not to report him because he was a rookie cop and did not want another incident reported against him. Two other officers directed Connor to sign a complaint they had prepared against Powell for simple assault, but Connor refused. Connor stated that one officer threatened that if she did not sign the complaint she was "going to have big trouble."

At 7:00 p.m., Connor returned from the hospital to the East District station. Shortly thereafter, she was transferred to the Newark Police Department's main headquarters at Green Street, where she was placed in a jail cell at approximately 7:30 p.m. Thereafter, Connor had no contact with any of the officer defendants. The cell-block personnel were responsible for Connor's bail procedure and release. Plaintiff never discussed bail with any of the defendants. At Green Street, Connor saw Powell, who was unrestrained, sitting with her husband, a retired Newark police officer, and her daughter, a current member of the Newark police force.

An "on-call" municipal court judge set bail in the amount of $350 sometime during the day of the arrest, as indicated in handwriting on the face of the complaint. There are no

documents indicating the name of the officer who placed the bail call or the time at which the call was placed. Lieutenant Mandriota stated in his deposition that he had no knowledge of any record or log kept in that regard. That Connor was never told about bail is uncontroverted. While in the jail cell, Connor asked numerous officers when she was going to be released, but the officers ignored her. Plaintiff contends that because this was her first arrest she knew nothing about the procedures for posting bail.

Plaintiff's friend, Barbara Grossman, testified that she made several inquiries of the police concerning Connor's release. Grossman asked a receptionist at Green Street about the procedure for Connor's release, and he replied that nothing could be done until the following day. Grossman also stated that she made five or six telephone calls during the night seeking information about Connor's release, although she did not remember the names of the individuals with whom she spoke. Finally, at 7:00 a.m. on Sunday, Grossman spoke with a police matron who instructed her to call a bail bondsman. Grossman contacted a bail bondsman who inquired on Connor's behalf and learned that her bail had been set. Grossman and plaintiff's daughter arrived at 11:30 a.m. on Sunday with the bail money. Bail was not posted until about 3:30 p.m. on Sunday, more than twenty-four hours after Connor had been arrested. The delay in Connor's release was caused, at least in part, by the police personnel's need to photograph and fingerprint Connor on Sunday afternoon.

On Monday, the Essex County Prosecutor's Office reduced the charges against plaintiff from indictable offenses to petty disorderly persons offenses. Connor was acquitted of the

downgraded charges at trial in the Newark Municipal Court. By contrast, Powell was found guilty of simple assault by the municipal court.

Plaintiff subsequently filed a complaint against Powell, the City of Newark, Officer Bircsak, Officer Badgley, Sergeant Cantalupo, and Lieutenant Mandriota. Powell died following the filing of the complaint, and the action against her was dismissed. Plaintiff's claims against the remaining defendants for false arrest and imprisonment, malicious prosecution, and violation of the Civil Rights Act proceeded to trial.

At the trial, Connor and five eyewitnesses testified to the unprovoked attack. Connor asserted that Powell received favored treatment because of her familial relationship with the Newark Police Department. On prior notice to the court and counsel, selected portions of the deposition transcripts of the individual defendants, Officers Bircsak, Badgley, Cantalupo and Mandriota were read to the jury. In his deposition, Officer Bircsak denied providing any information to Officer Badgley, noting that, "[t]here was no need because both parties described the incident." Officer Bircsak also denied seeing any type of weapon in either Powell's or Connor's possession. Officer Bircsak stated that he did not look for the fork because "there was a lot of confusion."

Officer Badgley stated in his deposition that he made the initial determination that plaintiff would be charged with the more serious charges and Powell would be charged with a simple assault "[b]ased on statements that was [sic] made to me by Miss Connor and Miss Powell and my conversation

with Sergeant Cantalupo." Officer Badgley further stated that he and Sergeant Cantalupo charged Connor with the more serious offenses because they believed that a fork constituted a deadly weapon, while a chair did not. Officer Badgley and Sergeant Cantalupo further determined that sufficient probable cause existed to issue a warrant, rather than simply a summons for Connor's charges. Sergeant Cantalupo stated in his deposition that as acting desk lieutenant in charge of the precinct, it was his duty to determine when a warrant, as opposed to a summons, should issue on a complaint.

When Sergeant Cantalupo's shift ended on the day of plaintiff's arrest, Lieutenant Richard Mandriota came on duty as acting lieutenant in charge of the precinct. In his deposition, Lieutenant Mandriota stated that he reviewed the paperwork submitted by Officer Badgley to make sure the statutory citations corresponded with the proper charges.

Penelope Powell signed both of the complaints with the notation, "[s]ubscribed and sworn to before me this 14 th day of May, 1994," above the jurat supposedly administered by Acting Lieutenant Mandriota. At his deposition, however, Lieutenant Mandriota stated that when he was presented with the complaints they were already signed. He further testified that although he "signed off on the summons and the warrant," he never asked Powell to describe the facts that gave rise to the allegations contained in the complaints, nor did he review any sworn statements of Powell or anyone else to make a determination of whether probable cause existed or whether a summons or warrant should issue. Rather, Mandriota claimed that Officers Bircsak and Badgley and Sergeant Cantalupo determined the charges that were to be brought against Connor.

Appendix A

At the conclusion of plaintiff's case, defendants' motions for involuntary dismissal of all of plaintiff's causes of action were granted. The court dismissed plaintiff's claims under the Tort Claims Act for failure to meet the threshold requirement of *N.J.S.A. 59:9-2(d)* of the loss of bodily function and medical treatment expenses in excess of $1000.00. The trial court also dismissed the *Section 1983* claim against the City of Newark based on counsel's concession that he could not show the requisite pattern and practice to establish municipal liability. Plaintiff does not appeal those dismissals.

Plaintiff does, however, vigorously contest the trial court's involuntary dismissal of plaintiff's *Section 1983* claims against the officers. The court found, as a matter of law, that probable cause existed for plaintiff's arrest and imprisonment. The trial court, however, did not state its factual findings. Instead, it summarily disposed of the probable cause issue as follows:

> I'm satisfied that based upon the line of questioning on the plaintiff's case that the plaintiff has taken a position that the police officer should have conducted further investigations before the arrest was made.
>
> I'm satisfied based upon the testimony that has been presented by the plaintiff that the officer and/or officers had probable cause to arrest. I make that ruling as a matter of law. And that there are no fact issues on which a reasonable jury could differ. That's my finding in this case.

Appendix A

The following day, plaintiff made an informal reconsideration motion asserting that even if probable cause were found to exist for her initial arrest, her claim for extended detention should survive. Plaintiff's counsel explained that he had "overlooked" the *Section 1983* cause of action for extended detention at trial. The trial court denied plaintiff's application.

Plaintiff, contending that her *Section 1983* claims should have been submitted to the jury, appealed to the Appellate Division. In an unpublished opinion, the Appellate Division affirmed the involuntary dismissal of plaintiff's claims. The Appellate Division, emphasizing that "[p]robable cause is an elusive concept heavily dependent upon a particular factual complex," concluded that the officers could defend against the *Section 1983* claim because probable cause existed to arrest plaintiff for aggravated assault. The panel reasoned that under N.J.S.A. 2C:12-1b(2), to attempt to cause bodily injury to another with a deadly weapon is a third-degree crime. N.J.S.A. 2C:11-1c defines a "deadly weapon" as any device or instrument which in the manner it is used or intended to be used is capable of producing death or serious bodily injury. The court observed that "even a plastic fork can be used in an aggressive fashion to cause severe injury to the victim's eyes or her sensitive parts of the body." As a result, the court held that Powell's sworn statement that plaintiff attacked her with a fork provided probable cause to arrest plaintiff for aggravated assault. The Appellate Division also found that the police reasonably could have believed that probable cause existed based on the specific facts known to them, citing *Kirk v. City of Newark, 109 N.J. 173, 536 A.2d 229 (1988)*. The Appellate

Division conceded that "it is certainly arguable that the police should have issued a summons rather than a warrant and a complaint." The court was unconvinced, however, that the police officers' failure to follow the summons prescriptions contained in *Rule 3:4-1* qualifies as a violation of a federal constitutional right actionable under *Section 1983*. Because plaintiff did not advance her *Section 1983* claim for her extended detention at trial, the panel did not consider that claim.

We granted plaintiff's petition for certification. *158 N.J. 685, 731 A.2d 45 (1999).*

II.

In *Wildoner v. Borough of Ramsey, 162 N.J. 375, 744 A.2d 1146*, also decided today, we held that a law enforcement official may defend a *Section 1983* claim arising from an arrest or search "by establishing either that he or she acted with probable cause, or even if probable cause did not exist, that a reasonable police officer could have believed in its existence." *Wildoner, supra, 162 N.J. at 386, 744 A.2d 1146*) (quoting *Kirk, supra, 109 N.J. at 184, 536 A.2d 229*). When the law enforcement official could reasonably have believed in the existence of probable cause, the issue of probable cause generally should be decided as a matter of law. *Kirk, supra, 109 N.J. at 185, 536 A.2d 229.* If officers of reasonable competence could disagree on the issue of probable cause, the doctrine of qualified immunity should be applied. *Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271, 278.*

Qualified immunity protects all officers "but the plainly incompetent or those who knowingly violate the law." *Malley, supra, 475 U.S. at 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271, 278 (1986)*. A bare allegation of malice is insufficient to defeat immunity if the defendant acted in an objectively reasonable manner. *Id. at 341, 106 S.Ct. at 1096, 89 L.Ed.2d at 278*. In order to enjoy qualified immunity, the official must demonstrate that "his conduct was justified by an objectively reasonable belief that it was lawful." *Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 577.*

Probable cause exists if at the time of the arrest "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Wildoner, supra, 162 N.J. 389, 744 A.2d 1146* (quoting *Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145 (1964)*).

III.

Our review of the record leads us to conclude as a matter of law that there was no probable cause to issue a complaint, and that no objectively reasonable police officer would have believed that probable cause existed to arrest plaintiff and issue a complaint-warrant against plaintiff for the aggravated assault and weapon offenses. A basic premise of plaintiff's argument is that the police violated her constitutional rights by failing to issue a summons rather than a warrant. That procedure led to plaintiff's arrest and imprisonment for

twenty-four hours. The rule in effect in 1994, at the time of the arrest, provided that a complaint-warrant should be issued only where the complaint charges murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, aggravated assault, aggravated arson, arson, burglary, first or second degree drug offenses, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes. See R. 3:4-1(b) (1994). As previously observed, in this case the charges were so inaccurately drawn that it is difficult to determine exactly what charges were intended. However, it is also clear that Connor was not charged with any of those listed offenses.

For all other offenses, including the crimes with which Connor was charged, the 1994 rule provided that a complaint-summons must be issued unless the officer determines: (1) the person has previously failed to respond to a summons; (2) the officer has reason to believe that the person is dangerous; (3) there are one or more outstanding arrest warrants for the person; (4) the prosecution of the offense or offenses for which the person is arrested or the prosecution of any other offense or offenses would be jeopardized by immediate release; (5) the person cannot be satisfactorily identified; or (6) the officer has reason to believe the person will not appear in response to the summons. See R. 3:4-1(d)(1) to (6)(1994). Clearly, none of those circumstances justifying issuance of a complaint-warrant existed in this case. Therefore, under those guidelines, the police erred in issuing a complaint-warrant.

However, even if a police officer erred in issuing a complaint-warrant, that "does not constitute a per se violation of plaintiff's constitutional rights." *Sanducci, supra, 315 N.J.Super. at 485, 719 A.2d 160* (quoting *O'Brien v. Borough of Woodbury Heights, 679 F.Supp. 429, 437 (D.N.J.1988)*). It is, however, a factor that must be considered in determining whether the police officers had probable cause or whether they reasonably believed that probable cause existed.

The relevant inquiry in determining objective reasonableness is whether a reasonable officer, in view of well-established law and the information the officers possessed, could have believed that probable cause existed to arrest plaintiff. In *Malley v. Briggs*, the Supreme Court in applying the objective reasonableness test held that a police officer would "not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. . . ." *Malley, supra, 475 U.S. at 341, 106 S.Ct. at 1096, 89 L.Ed.2d at 278.*

A plain reading of the requirements of R. 3:4-1(b) would lead any officer to conclude that complaint-warrants were not to be issued in this case. If plaintiff should have been charged at all, then only a complaint-summons should have been prepared and plaintiff, like Powell, should have been immediately released. Based on the totality of circumstances: the lack of evidence against plaintiff, the plain language of R. 3:4-1(b), and the different treatment afforded Powell, we conclude that no reasonably objective officer would have arrested plaintiff and issued a complaint-warrant resulting in her imprisonment. *Gurski v. State Police Dept., 242 N.J.Super. 148, 162, 576 A.2d 292 (1990)* (holding that police officers acted unreasonably in conducting search).

Specifically, no prudent police officer reasonably could have believed that plaintiff possessed a dangerous weapon or used it to assault Powell. A "weapon" is defined as "anything readily capable of lethal use or of inflicting serious bodily injury." N.J.S.A. 2C:39-1r. First, although Powell did not specify whether the fork was made of metal or plastic, and the officers did not ask, indeed, the record established that the fork was plastic. Although some weapons are per se deadly, such as firearms, other instruments are deadly only if in the manner used or intended to be used, they are capable of producing death or serious bodily injury. Courts of other jurisdictions have deemed a metal fork a "deadly weapon." See, e.g., *State v. Kiluk, 120 N.H. 1, 410 A.2d 648, 651 (1980)* (holding that metal fork used to strike person in eye was deadly weapon); *People v. Moran, 33 Cal.App.3d 724, 109 Cal.Rptr. 287, 291 (1973)* (holding that three-pronged metal fork constituted deadly weapon). However, no reported case has considered a plastic fork to be a deadly weapon. The totality of circumstances in this matter demonstrate that no objectively reasonable police officer would find that the plastic fork allegedly used by plaintiff was a "deadly weapon."

Secondly, serious bodily injury is defined in N.J.S.A. 2C:11-1b as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Second degree aggravated assault is defined as causing or attempting to cause serious bodily injury to another. It is undisputed that no one was seriously injured in this case. No officer reasonably could have considered a plastic fork a dangerous weapon, nor could an officer reasonably conclude that plaintiff attempted to cause serious bodily injury with such a fork.

Appendix A

Plaintiff and five independent witnesses testified at trial, from among the fifty or more eyewitnesses, to the events leading to her arrest. Powell admitted to the police that she struck plaintiff several times with a wooden chair. Every witness who testified at trial attested to Powell's unprovoked attack on the unarmed plaintiff. Indeed, Powell also struck a volunteer at the bingo hall with a chair. In their on-the-scene "investigation," the police did not speak to anyone at the bingo hall about the incident other than the two parties directly involved. Even defendant Officer James Bircsak, who was at the scene at the time of the incident, provided no information to the arresting police with regard to the facts of the incident. Officer Bircsak did state that he did not see a weapon in the possession of either of the parties.[2] Thus, aside from Powell's unsupported oral statement, there was not a scintilla of evidence to support a finding of probable cause against plaintiff for the indictable charges forming the basis of her arrest.

The Appellate Division, in concluding that probable cause existed to arrest plaintiff for aggravated assault, placed great reliance on the fact that Powell made a sworn statement. The Appellate Division panel cited a recent opinion by the same panel, *Sanducci v. City of Hoboken, 315 N.J.Super. 475, 719 A.2d 160 (App.Div.1998)*, in which a complainant's sworn statement provided probable cause for an arrest. In

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2. We observe that Officer Bircsak's statement that he did not see any weapons in either woman's possession is suspect, given that a number of witnesses testified that he observed the altercation. Officer Bircsak's claim that he did not provide any information to Officer Badgley is equally suspect, given that following the incident, the two officers went outside to talk for a few minutes.

Sanducci, police officers witnessed a fight between four individuals who were arrested and subsequently charged with simple assault. *Id. at 479, 719 A.2d 160.* In a separate summons and warrant, one defendant, Sanducci, was charged with fourth-degree stalking based upon the sworn statement of McDonald, another party to the fight. *Ibid.* McDonald claimed that Sanducci had stalked her on three prior occasions. *Ibid.* Sanducci argued that McDonald's sworn statement did not justify her arrest and detention for fourth-degree stalking. *Id. at 480, 719 A.2d 160.*

The *Sanducci* court concluded that plaintiff's arrest for stalking was supported by probable cause. *Id. at 482, 719 A.2d 160.* Although the court acknowledged that McDonald and Sanducci were adversaries, it determined that the police nevertheless acted reasonably in relying upon McDonald's sworn statement. *Ibid.* The court explained: "[t]here is an assumption grounded in common experience that . . . [an ordinary citizen], in reporting criminal activity, would be motivated by factors which are consistent with law enforcement goals." *Ibid.* The court further noted that the reliability of the allegation is heightened "when the citizen provides the police with a sworn statement, thus subjecting himself or herself to potential civil or criminal liability." *Ibid.*

Unlike the witness in *Sanducci*, Powell did not provide a sworn statement to the police. The only document that might be deemed a sworn statement are the complaints purportedly signed by Powell in Lieutenant Mandriota's presence. However, Mandriota stated in his deposition testimony that those complaints had been presented to him for his review and signature after they had been signed by Powell, outside

his presence. Mandriota also stated that he did not meet with Connor or Powell, that he never asked Powell which facts gave rise to the statements in the complaint, and that there were no statements signed by Powell in the paperwork he reviewed. Even though Mandriota testified that it was his duty to make a determination that there was sufficient probable cause to issue the complaint, he also acknowledged that after reviewing the paperwork he "signed off," and the determination of the sufficiency of probable cause was made by the officers and on-duty lieutenant at the time. Later in his deposition, Lieutenant Mandriota provided inconsistent testimony, suggesting that Powell signed the complaints in his presence. However, reading Mandriota's entire deposition, it is evident that he never spoke to Powell about her assertions in the complaint, never reviewed any statements made by Powell, and never reviewed the complaints to determine if there was probable cause for their issuance. Under those circumstances, Powell's statement that Connor threatened her with a fork was not sufficient to provide the officers with probable cause to arrest her for aggravated assault.

Even assuming arguendo that Powell's sworn complaints were interpreted by this Court to be a sworn statement akin to the statement in *Sanducci*, this Court must also consider the totality of the circumstances under which a statement was made, including the relationship and motive of the private citizen- informant, in evaluating whether the officers acted in an objectively reasonable manner in believing that probable cause existed. In *Wildoner*, we held that a private citizen's statements that were corroborated by the police through their independent investigation were sufficient under

those circumstances to establish that the police reasonably believed they had probable cause to arrest Mr. Wildoner for domestic violence against his wife. *Wildoner, supra, 162 N.J. at 394, 744 A.2d 1146.* In *Wildoner*, the informing witness was the plaintiff's neighbor, who after hearing loud and abusive language coming from plaintiff's apartment, made a report to the police out of concern for plaintiff's wife's safety. *Id. at 380, 744 A.2d 1146.* Likewise, in *Kirk*, the informant was an investigator for the Division of Youth and Family Services, motivated by her desire to prevent harm to a child. *Kirk, supra, 109 N.J. at 176, 536 A.2d 229.* Here, by contrast, the complainant was plaintiff's adversary. The only facts supporting Powell's account of the events were her uncorroborated statements. Therefore, the totality of circumstances in this case do not support defendants' argument that they acted in an objectively reasonable manner in concluding that probable cause existed.

The Appellate Division also found that due diligence did not require the police to conduct any investigation of the situation before charging Connor with the indictable offenses. The court, quoting *Kirk*, stated: "we are aware of no constitutional principle 'that a police officer who reasonably believes he has probable cause must conduct further investigation or risk a subsequent charge of failing to exercise diligence' ". However *Kirk* states that an officer is not required to conduct further investigation once he reasonably believes he has probable cause. *Kirk, supra, 109 N.J. at 188, 536 A.2d 229.* In *Kirk*, the Court rejected a claim that an investigator of the Division of Youth and Family Services was unreasonable in not conducting a more thorough investigation on whether a three-year-old child had been

scalded. *Id. at 189, 536 A.2d 229.* In both *Wildoner* and *Kirk*, we found that a critical factor in determining whether the officer reasonably believed that he or she had probable cause was the nature of the incident underlying the complaint. In Wildoner, the incident involved an allegation of domestic violence. *Wildoner, supra, 162 N.J. at 394, 744 A.2d 1146.* In *Kirk*, the police detective was confronted with the possibility of child abuse. *Kirk, supra, 109 N.J. at 187, 536 A.2d 229.* Here, by contrast, the factual circumstances involving an altercation between two individuals at a bingo hall were not so compelling that the police could not have conducted further investigation prior to charging Connor with aggravated assault.

In reaching this conclusion, we do not intend to suggest that police are always required to conduct a further investigation before establishing the required reasonable belief that there is probable cause to effect an arrest. As we noted in *Kirk*, "[s]uch a rule could paralyze police and prevent them from acting to protect the public." *Kirk, supra, 109 N.J. at 188, 536 A.2d 229.* We simply hold that under the factual circumstances presented here, the police could not reasonably have believed that probable cause existed to charge Connor with aggravated assault. Aside from Powell's allegation, there was no evidence to support a finding of probable cause for the indictable charges forming the basis of Connor's arrest. Contrary to the Appellate Division's finding, Powell never provided a sworn statement to the police, and it is unclear whether she ever swore to the complaints. Even if Powell had made accusatory statements at the scene, they were insufficient to establish probable cause. Officer Badgley conducted absolutely no investigation to determine the veracity of Powell's accusation. None of the some fifty

eyewitnesses, including Officer Bircsak, were questioned by Officer Badgley. Both Officer Bircsak and Officer Badgley admitted they did not even attempt to look for the fork. Under the circumstances, it cannot be held as a matter of law that the police acted in an objectively reasonable manner in arresting plaintiff on the word of the complainant alone, particularly when all the evidence was contrary to such a conclusion.

IV.

The Appellate Division refused to consider plaintiff's *Section 1983* claim for her extended detention, concluding that the argument was not advanced at trial. Defendants characterize plaintiff's extended detention claim as "a belated attempt to create a new basis of recovery." When the trial judge asked counsel to identify plaintiff's causes of action, counsel did not clearly articulate a *Section 1983* claim for extended detention.

Although we do not consider the issue of whether defendants are also liable under *Section 1983* for plaintiff's extended detention, we observe that plaintiff has failed to establish that the officer defendants named in the complaint participated in the bail procedure. "An individual cannot be liable in a *§ 1983* action unless he caused or participated in an alleged constitutional deprivation." *Harrington v. Lauer, 893 F.Supp. 352, 355 (D.N.J.1995)* (internal quotations and citation omitted) (emphasis in original). In order to prevail against a specific defendant, a plaintiff must establish personal involvement by that defendant in the alleged constitutional deprivation to be entitled to damages. *McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir.1977),* cert. denied, *434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792*

(1978). The record reveals that none of the defendants saw plaintiff after 7:30 p.m. on Saturday. The record shows that Lieutenant Mandriota and Sergeant Cantalupo were in charge of supervising the East District precinct. They were not, however, responsible for supervising the Green Street jail. The officer in charge of the Green Street cell block was responsible for assuring that bail was set. Presumably, one of the Green Street officers would have been charged with informing plaintiff that bail had been set.

V.

The record establishes that there was no probable cause to arrest and to issue a complaint-warrant to plaintiff and that no police officer reasonably could believe that probable cause existed to do so. From the record, all of the officer defendants were either involved in the arrest or in the issuance of complaint-warrants for the aggravated assault and weapon offenses. Defendants failed to assert as an alternative defense that if their motions for dismissal were reversed material facts remained in dispute that would require a new trial on liability. Accordingly, the judgment of the Appellate Division is reversed and the case is remanded for a trial on damages in accordance with this opinion.

For reversal and remandment — Chief Justice PORITZ and Justices O'HERN, GARIBALDI, STEIN, COLEMAN, LONG and VERNIERO — 7.

Opposed — None.

APPENDIX B — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED, DECIDED AND FILED OCTOBER 20, 1998

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1094-97T1

SONDRA CONNOR,

Plaintiff-Appellant,

v.

PENELOPE POWELL,

Defendant,

and

NEWARK POLICE DEPARTMENT, OFFICER FOSTER BADGLEY, SGT. JOHN CANTALUPO, OFFICER JAMES BIRCSAK, ACT. LT. RICHARD MANDRIOTA and JOHN DOE (Fictitious Name),

Defendants-Respondents.

Appendix B

PENELOPE POWELL,

Defendant/Third Party Plaintiff,

v.

AUX. OF FOUNDATION FOR SERVICE CHILDREN & YOUNG ADULTS WITH LEARNING DISABILITIES OF NJ, INC. and LIVINGSTON AUX. OF FOUNDATION FOR SERVICING CHILDREN & YOUNG ADULTS WITH LEARNING DISABILITIES OF NJ,

Third Party Defendants.

Argued October 7, 1998 — Decided OCT 20 1998

Before Judges Baime and Kimmelman.

On appeal from Superior Court of New Jersey, Law Division, Essex County.

* * *

PER CURIAM

Plaintiff appeals from the involuntary dismissal of her claim for violations of the federal Civil Rights Act (42 *U.S.C.* 1983). In her complaint, plaintiff contended that she was arrested without probable cause. Following the close of the evidence, the Law Division found as a matter of law that plaintiff's arrest was justified by the facts known to the police. Plaintiff challenges that finding and asserts

additionally that her extended detention violated her constitutional right to due process. We perceive no sound basis to disturb the judgment entered.

I.

Plaintiff is the executive director of the Foundation for Servicing Adults with Learning Disabilities. In that capacity, plaintiff supervises the operations of a bingo game conducted in a hall located in the City of Newark.

On May 14, 1994, plaintiff was preparing for the day's bingo activities when she observed Penelope Powell engaging in illegal bets. Plaintiff admonished Powell in strong terms. According to plaintiff and several other witnesses, Powell responded by attacking plaintiff with a chair. Plaintiff sought the assistance of James Bircsak, an off-duty Newark Police officer who was present in the hall. Bircsak was periodically hired by the Foundation to provide security. Conflicting evidence was presented concerning whether he was employed in that capacity that day. In any event, plaintiff claimed that Bircsak refused to intervene. The police were then summoned.

Approximately fifteen minutes later, police officer Foster Badgley responded. Plaintiff told Badgley that Powell had assaulted her with a chair. However, Powell claimed that plaintiff had attacked her with a fork. Neither plaintiff nor Powell exhibited any signs of injury. Badgley thus asked whether either or both wished to file a complaint. Both individuals insisted that the police further pursue the matter, and toward that end voluntarily accompanied the officer to

police headquarters where they repeated their conflicting factual allegations.

Powell was charged with simple assault and was immediately released. The complaints filed against plaintiff were inartfully drafted, and we cannot determine exactly what charges were intended. In a warrant and complaint, plaintiff was charged with possession of a weapon, a fork, for an unlawful purpose. However, the charging documents refer to *N.J.S.A.* 2C:39-5b, which pertains to possession of a handgun without a permit. In a second count, plaintiff was charged with aggravated assault, but again the complaint refers to an erroneous statutory citation, *N.J.S.A.* 2C:12-1b(5), which pertains to assaults on police officers. In a separate summons and complaint, plaintiff was charged with possession of a dangerous weapon, a fork. This document cites *N.J.S.A.* 2C:39-4a, a statute dealing with possession of a firearm for an unlawful purpose.

In any event, it is undisputed that plaintiff, unlike Powell, was not immediately released. At trial, plaintiff contended that Powell received favored treatment because her daughter was a member of the police force. However, Badgley and John Cantalupo, the booking sergeant on duty at the time the charges were filed, testified that plaintiff was charged with the more serious offenses because they believed that a fork constituted a more dangerous weapon than a chair. It is nevertheless unclear why plaintiff was not issued a summons and permitted to leave.

It is undisputed that plaintiff was "hysterical" and that she demanded to be taken to a hospital despite having no

outward signs of injury. It is also undisputed that plaintiff initially refused to be treated at University Hospital and insisted that she be transported to Beth Israel Medical Center. Plaintiff was taken to the hospital at 4:00 p.m. and returned to police headquarters at 7:00 p.m. She was then placed in a jail cell. The record is somewhat unclear when bail was set. However, it is apparent from the documentary evidence presented that an "on-call" judge set bail in the amount of $350 on the same day as plaintiff's arrest. Plaintiff testified, however, that while she was allowed to telephone her attorney, she was never told that bail had been set. Ultimately, bail was posted, and plaintiff was released. It appears that plaintiff was in police custody for approximately twenty to twenty-four hours following her arrest.

We add that the charges against plaintiff were subsequently reduced from indictable to petty disorderly persons offenses. She was ultimately acquitted of those charges. In contrast, Powell was found guilty of simple assault.

Plaintiff brought suit against Powell, the Newark Police Department, Bircsak, Badgley and Cantalupo. Powell died following the filing of the complaint, and the action against her was dismissed. Plaintiff's claims against the remaining defendants for false arrest and imprisonment, malicious prosecution and violations of the Civil Rights Act proceeded to trial. After the close of the evidence, plaintiff's action against Bircsak was dismissed on the ground that he did not participate in the arrest or the imprisonment and prosecution. Plaintiff's claims under the Tort Claims Acts were dismissed because she failed to meet the threshold requirement of

N.J.S.A. 59:9-2(d). *See Collins v. Union County Jail*, 150 *N.J.* 407 (1997). The Law Division also dismissed plaintiff's claims under section 1983, finding as a matter of law that probable cause existed for the arrest and imprisonment. This appeal followed.

II.

Plaintiff's brief is silent respecting the trial court's disposition of her common law claims — false arrest and imprisonment and malicious prosecution. We, therefore, assume that she has abandoned those causes of action. We thus focus upon plaintiff's contention that her claim for violations of the Civil Rights Act should have been submitted to the jury.

Many of the issues presented here were addressed in *Sanducci v. City of Hoboken*, __ *N.J. Super.* __ (App. Div. 1998). We recite the applicable legal principles as described in that recent opinion. In 1961, the United States Supreme Court rendered its decision in *Monroe v. Pope*, 365 *U.S.* 167, 81 *S.Ct.* 473, 5 *L.Ed.*2d 492 (1961), holding that a state or local official could be held liable under section 1983 for depriving another person of his or her federal constitutional rights. Several years later, the Court recognized in *Pierson v. Ray*, 386 *U.S.* 547, 87 *S.Ct.* 1213, 18 *L.Ed.*2d 288 (1967), that an official could defend against a section 1983 action by asserting a defense of qualified immunity. The evolution of the law that followed was thoroughly described by our Supreme Court in *Kirk v. City of Newark*, 109 *N.J.* 173 (1988). We need not retread upon ground so exhaustively covered by that opinion. Suffice it to say, "a law enforcement

official can defend a section 1983 claim by establishing either that he or she acted with probable cause, or even if probable cause did not exit, that a reasonable police officer could have believed in its existence." *Id.* at 184 (citing *Anderson v. Creighton*, 483 *U.S.* 635, 663, 107 *S.Ct.* 3034, 3052, 97 *L.Ed.*2d 523, 546 (1987) (Stevens, J., dissenting)); *see also Malley v. Briggs*, 475 *U.S.* 335, 106 *S.Ct.* 1092, 89 *L.Ed.*2d 271 (1986); *Harlow v. Fitzgerald*, 457 *U.S.* 800, 102 *S.Ct.* 2727, 73 *L.Ed.*2d 396 (1982). Questions presented within this framework of analysis are particularly amenable to disposition by motion. *See Kirk v. City of Newark*, 109 *N.J.* at 187.

Probable cause is an elusive concept heavily dependent upon the particular factual complex. It is more than mere suspicion but less than legal evidence necessary to convict. *State v. Mark*, 46 *N.J.* 262, 271 (1966). It has been described by our Supreme Court as a "well grounded" suspicion that an offense has been committed. *State v. Burnett*, 42 *N.J.* 377, 387 (1964); *see also State v. Waltz*, 61 *N.J.* 83, 87 (1972); *State v. Kasabucki*, 52 *N.J.* 110, 116 (1968); *State v. Laws*, 50 *N.J.* 159, 173 (1967), *cert. denied*, 393 *U.S.* 971, 89 *S.Ct.* 408, 21 *L.Ed.*2d 384 (1968); *State v. Davis*, 50 *N.J.* 16, 23-25 (1967), *cert. denied*, 389 *U.S.* 1054, 88 *S.Ct.* 805, 19 *L.Ed.*2d 852 (1968); *State v. Dilley*, 49 *N.J.* 460, 463-64 (1967).

Our courts have eschewed technisms in reviewing factual circumstances to determine whether probable cause exists. *State v. Esteves*, 93 *N.J.* 498, 505 (1983). Probable cause must be drawn from the "practical considerations of everyday life" as tested by reasonably prudent persons. *Brinegar v. United States*, 338 *U.S.* 160, 175, 69 *S.Ct.* 1302, 1310, 93

L.Ed. 1879, 1890 (1949). In dealing with probable cause, "as the very name implies, we are concerned with probabilities." *Ibid.* We must not forget that resolution of questions regarding whether or not probable cause exists often "involves no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law, and indeed a value judgment which inevitably reflects the seasoning and experience of the one who judges." *State v. Funicello*, 60 *N.J.* 60, 72-73 (Weintraub, C.J., concurring), *cert. denied sub nom. New Jersey v. Presha*, 408 *U.S.* 942, 92 *S.Ct.* 2849, 33 *L.Ed.*2d 766 (1972). It bears repeating that "the common and specialized experience and work-a-day knowledge of police [officers] must be taken into account." *State v. Contursi*, 44 *N.J.* at 431. Abstract contemplation will not suffice because the decisions of police officers must be made on the spur of the moment and cannot be viewed fairly from the vantage point of twenty-twenty hindsight. The answer must be found "in the tumult of the streets." *State v. Gerardo*, 53 *N.J.* 261, 264 (1969).

Against this backdrop, we are satisfied that the police had probable cause to arrest plaintiff for aggravated assault. Under *N.J.S.A.* 2C:12-1b(2), it is a third degree crime to attempt to cause bodily injury to another with a deadly weapon. *N.J.S.A.* 2C:11-1c defines "deadly weapon" as any device or instrument which in the manner in which it is used or intended to be used is capable of producing death or serious bodily injury, or which in the manner in which it is fashioned would lead the victim to believe it to be capable of producing death or serious bodily injury. Plaintiff asserts that only plastic forks were used in the bingo hall. But even a plastic fork can be used in an aggressive fashion to cause

severe injury to the victim's eyes or other sensitive parts of the body, thus resulting in "serious, permanent disfigurement, or protracted loss or impairment of [a] bodily member or organ." *N.J.S.A.* 2C:11-1b. We have held that instruments generally considered to be relatively innocuous can nevertheless be used in such a way as to cause serious bodily injury. *See, e.g., State v. Dishon*, 222 *N.J. Super.* 58, 62 (App. Div. 1987), *certif. denied*, 110 *N.J.* 508 (1988); *see also State v. Villar*, 150 *N.J.* 503, 513 (1997); *State v. Harmon*, 104 *N.J.* 189, 210 (1986). Moreover, a plastic fork can be fashioned to make it appear more lethal than it really is. *See State v. Mieles*, 199 *N.J. Super.* 29 (App. Div.), *certif. denied*, 101 *N.J.* 265 (1985); *State v. Gantt*, 195 *N.J. Super.* 114 (App. Div. 1984), *aff'd*, 101 *N.J.* 573 (1986); *State v. Bill*, 194 *N.J. Super.* 192 (App. Div. 1984). We thus hold that Powell's sworn statement provided probable cause to arrest plaintiff, and the police officers cannot be faulted for acting upon her complaint.

Beyond this, at the very least, the police could have reasonably believed that probable cause existed based upon the specific facts known to them. *Kirk v. City of Newark*, 109 *N.J.* at 186. Perhaps further investigation would have disclosed the falsity of Powell's factual allegations. However, we are aware of no constitutional principle "that a police officer who reasonably believes he has probable cause must conduct further investigation or risk a subsequent charge of failing to exercise due diligence." *Id.* at 188. Such a rule could paralyze the police and prevent them from acting to protect the public.

Appendix B

III.

We need not consider plaintiff's contention that her "extended detention" was violative of the federal Constitution and was thus actionable under section 1983. That argument was not advanced during the trial. Instead, plaintiff's attorney asserted to the trial court that the sole "issue [was] . . . whether it was objectively reasonable for [his] client to be arrested for . . . aggravated assault by a dangerous weapon." When the trial court *sua sponte* raised the question whether bail was set in a timely fashion, the attorney responded that the setting of bail and the timing of plaintiff's release "ha[d] nothing to do with the issue of . . . probable cause for the arrest" and did not have "a whole lot of relevance . . . ." The issue of plaintiff's "extended detention" was not raised until after the trial court had granted defendants' motion for an involuntary dismissal pursuant to *R.* 4:37-2(b). We have no occasion to determine the merits of plaintiff's argument because it was not advanced below.

We nevertheless add that we harbor serious reservations concerning plaintiff's argument. While it is certainly arguable that the police should have issued a summons rather than a warrant and complaint, "an individual defendant's non-compliance with a state-mandated procedure does not in and of itself give rise to a claim cognizable under [s]ection 1983." *O'Brien v. Borough of Woodbury Heights*, 679 *F. Supp.* 429, 437 (D. N.J. 1988). Further, the United States Supreme Court recently held that "a jurisdiction that provides judicial determination of probable cause [and bail] within [forty-eight] hours of arrest will, as a general matter, comply with [constitutional standards]." *County of Riverside v.*

McLaughlin, 500 *U.S.* 44, 56, 111 *S.Ct.* 1661, 1670, 114 *L.Ed.*2d 49, 63 (1991). The Court acknowledged that states are free to consolidate probable cause hearings with other pretrial proceedings, such as bail determinations, and noted that if such decisions do not occur within forty-eight hours after arrest, "the burden shifts to the government to demonstrate the existence of a *bona fide* emergency or other extraordinary circumstance." *Id.* at 57, 111 *S.Ct.* at 1670, 114 *L.Ed.*2d at 63. While the Court observed that probable cause and pretrial release determinations provided within forty-eight hours of arrest may not pass constitutional muster if the arrested person can prove that the decision was delayed unreasonably, *id.* at 56, 111 *S.Ct.* at 1670, 114 *L.Ed.*2d at 63, the record contains no evidence sufficient to warrant submission of that issue to the jury.

Given the fluid situation, we doubt that the failure of the police to apply the summons prescriptions contained in *R.* 3:4-1 qualified as a violation of a federal constitutional right actionable under section 1983. Perhaps plaintiff might have had a viable cause of action for false arrest and imprisonment had she been able to defeat the cloak of immunity provided by *N.J.S.A.* 59:9-2d. *See Marion v. Borough of Manasquan*, 231 *N.J. Super.* 320, 330-32 (App. Div. 1989). But the summons requirement does not embody a federal constitutional standard and "does not constitute a *per se* violation of plaintiff's constitutional rights." *O'Brien v. Borough of Woodbury Heights*, 679 *F. Supp.* at 437; *see also Talbert v. Kelly*, 799 *F.*2d 62 (3d Cir. 1986).

Affirmed.

APPENDIX C — ORDER OF JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DATED AND FILED OCTOBER 3, 1997

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**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY**

DOCKET NO. ESX-L-5840-95

Civil Action

SONDRA CONNOR,

Plaintiff(s),

v.

PENELOPE POWELL,

Defendant(s).

ORDER OF JUDGEMENT

Appendix C

THIS MATTER having been assigned for trial on September 22, 23, 24, and 25, 1997, before the Honorable F. Michael Caruso, J.S.C., and a jury of seven and the defendant City of Newark, Foster Badgley, John Cantalupo, James Bircsak, and Richard Mandriota, having made a motion for a directed verdict at the conclusion of the plaintiff's case, and the Court having considered the evidence presented, argument of counsel, and for good cause shown;

IT IS on this 3rd day of October, 1997;

ORDERED:

1. that the claims against the individual defendants Cantalupo, Bircsak, Badgley and Mandriota, and the City of Newark brought under the provisions of State law as controlled by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. are dismissed for failure to satisfy the requirements of the New Jersey Tort Claims Act with respect to injury and medical expense pursuant to N.J.S.A. 59:9-2(d).

2. that Judgment is entered in favor of the City of Newark on all allegations under the provisions of 42 U.S.C. §1983 based on plaintiff's failure to present evidence to establish a pattern and practice.

3. that Judgment is entered in favor of all defendants, Foster Badgley, John Cantalupo, James Bircsak, Richard Mandriota, and the City of Newark, based on a finding of probable cause for the arrest of the plaintiff as a matter of law.

s/ F. Michael Caruso
Honorable F. Michael Caruso, J.S.C.

APPENDIX D — RELEVANT RULES

R. 3:4-1 (1994)

3:4-1. Procedure After Arrest

(a) A person arrested under a warrant issued upon a complaint shall be taken, without unnecessary delay, before the court named in the warrant. A person arrested without a warrant for any offense shall be taken, without unnecessary delay, before the nearest available committing judge if the person demands to be taken before a judge.

(b) Whenever a law enforcement officer has effected an arrest without a warrant for murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, aggravated assault, aggravated arson, arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes, the arrested person shall be taken to the police station where a complaint-warrant shall be prepared forthwith. After the complaint-warrant is prepared, the person arrested shall be taken without unnecessary delay before the nearest available committing judge. If there is probable cause to believe that one of said crimes has been committed by the arrested person, the warrant shall be issued by the judge, court clerk or deputy clerk. The judge shall have the authority to issue a complaint-summons if the judge determines that the defendant will appear in response to a summons. The judge before whom the arrested person is taken shall advise such person of that person's rights in accordance with R. 3:4-2.

(c) Whenever a law enforcement officer has effected an arrest without a warrant for an offense other than an offense enumerated in paragraph (b) hereof, the arrested person shall be taken to a police station where the officer in charge shall, after completion of all post-arrest identification procedures required by law, prepare a complaint-summons, issue it to the person arrested and release that person in lieu of continued detention. However, the officer has the discretion not to prepare a complaint-summons if the officer determines that any of the conditions set forth in paragraph (d) exist. If the officer determines not to prepare a complaint summons, a complaint-warrant shall be prepared forthwith and the person arrested shall be taken without unnecessary delay before the nearest available committing judge. If there is probable cause to believe that the defendant committed the offense, the judge, court clerk, or deputy clerk shall issue the complaint-warrant unless it is determined that none of the conditions set forth in paragraph (d) hereof exist in which case a complaint-summons shall be prepared, issued, and the person arrested shall be released. The judge before whom the arrested person is taken shall advise such person of the person's rights in accordance with R. 3:4-2.

(d) An officer shall have the discretion not to issue a complaint-summons when any of the following conditions exists;

(1) The person has previously failed to respond to a summons;

(2) The officer has reason to believe that the person is dangerous to himself, to others or to property;

Appendix D

(3) There is one or more outstanding arrest warrants for the person;

(4) The prosecution of the offense or offenses for which the person is arrested or the prosecution of any other offense or offenses would be jeopardized by immediate release of the person;

(5) The person cannot provide satisfactory evidence of personal identification; or

(6) The officer has reason to believe the person will not appear in response to a summons.

* * *

R. 4:37-2

4:37-2. Involuntary Dismissal; Effect Thereof

(a) For Failure to Comply With Rule or Order. For failure of the plaintiff to cause a summons to issue within 10 days after filing the complaint or to comply with these rules or any order of court, the court in its discretion may on defendant's motion dismiss an action or any claim against the defendant. Such a dismissal shall be without prejudice unless otherwise specified in the order.

(b) At Trial — Generally. After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without

waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

(c) At Trial — Claim for Contribution. When a claim for contribution has been asserted pursuant to R. 4:7-5, a motion for dismissal as to any defendant against whom such claim has been asserted shall be held in abeyance until the close of all the evidence, and at that time the granting of the motion shall constitute an adjudication upon the merits of the claim for contribution. If the motion is denied, the claim for contribution need not be separately submitted to the jury but the verdict as to the liability of each defendant shall determine which of the parties are joint tortfeasors. If the amount of the contribution of each defendant may be determined as a matter of law, the judge shall enter judgment thereon at the request of any party. If any party asserts any settlement or part payment or other matter not determined in the negligence action which may affect the amount of the contribution, and there is a dispute as to any material fact, a separate trial shall be held to determine the same.

(d) Dismissal With Prejudice; Exceptions. Unless the order of dismissal otherwise specifies, a dismissal under R. 4:37-2(b) or (c) and any dismissal not specifically provided for by R. 4:37, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits.

Appendix D

(e) Continued Participation in Subsequent Proceedings. If a claim is dismissed as to a defendant before final judgment as to all issues and all parties, that defendant shall have notice of and the right to participate in any subsequent proceedings in the case.

* * * *